

**CALPERS CONTRACT TERMS AND CONDITIONS - TABLE OF CONTENTS**

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**BUSINESS TERMS**1. Term of Agreement

The term of this Agreement shall commence on \_\_\_\_\_ (the Effective Date) and terminate \_\_\_\_\_, unless earlier terminated in accordance with the provisions of this Agreement.

2. Project Start Date

The project start date shall be the date CalPERS approves the Performance Bonds required under Rider A of this Agreement. CalPERS Project Manager will notify Contractor, in writing, of the official project start date.

3. Amendments

This Agreement may be amended only by mutual consent of the parties. Except as provided herein, no alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the parties hereto, and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.

4. Key Persons and Key Positions

- A. In case the parties have identified any individual engaged by Contractor or any subcontractor who will play a significant administrative, policy or consulting role that is Team Lead level or higher under this Agreement as a "Key Person", then Contractor shall not replace any such Key Person without CalPERS prior approval, not to be unreasonably withheld. Attachment A contains a list of all individuals that the parties have identified as Key Persons as of the project start date. Attachment A shall be modified to reflect changes in Key Persons occurring during the term of the Agreement. CalPERS reserves the right to disapprove the continuing assignment of Contractor Key Persons provided to CalPERS under this Agreement.
- B. In case the parties have identified any specific job title in Contractor's organization that will play a significant role under this Agreement as a "Key Position," (regardless of whether the individual filling the position is a Key Person) then Contractor shall not leave the Key Position vacant at any time during the term of this Agreement. In case a person holding a Key Position resigns or is reassigned, and Contractor has at the time of the resignation not chosen a permanent replacement for such person, then Contractor shall immediately fill the Key Position with a temporary full-time person until a permanent assignment for the Key Position can be made.
- C. Additional provisions applicable to Key Persons and Key Positions are contained in Rider I.



5. Required Notice of Contractor Changes

In case any of the following events occurs:

- A. Any of Contractor's representations and warranties, as set forth in this Agreement, cease to be true at any time during the term of this Agreement; or,
- B. Contractor intends to replace any Key Person; or,
- C. There is a resignation or replacement of a person in a Key Position; or,
- D. There is any change in the majority ownership, control, or business structure of Contractor; or,
- E. There is any other change in Contractor's business, partnership or corporate organization that a reasonable person might believe could have a material impact on Contractor's performance of this Agreement or on CalPERS rights under this Agreement.

Then Contractor shall notify CalPERS in writing at least five (5) days after such event. All written notices from Contractor under this provision shall contain sufficient information to permit CalPERS to evaluate the changes under the same criteria that were used by CalPERS in its award of this Agreement to Contractor. Contractor agrees to provide CalPERS with such additional information as CalPERS may request. If Contractor requests confidential treatment for any information it provides, CalPERS shall treat the information as confidential, subject to applicable law.

6. Insurance Requirements

Contractor warrants that it carries adequate liability, worker's compensation, and other necessary insurance and shall maintain such insurance at levels reasonably acceptable to CalPERS in full force and effect during the term of this Agreement. In making its determination of what levels of insurance are reasonably acceptable to CalPERS, CalPERS shall take into account the nature of the insurable risks entailed in Contractor's performance of the Agreement and Contractor's ability, if any, to self-insure any risk. Contractor agrees to furnish satisfactory evidence of this insurance coverage to CalPERS upon request.

7. Termination at Off-Ramps

A. Termination at the First Off-Ramp

- (i) At the end of Phase I, Initiation, CalPERS or the Contractor may unilaterally terminate this Agreement.
- (ii) In order to effect a termination at this First Off-Ramp, the party initiating termination shall provide written notice to the other party.
- (iii) Promptly after CalPERS receipt or initiation of aforesaid notice, and receipt of Contractor's invoice, CalPERS shall pay Contractor for all Phase I deliverables accepted by CalPERS.



B. Termination at Subsequent Off-Ramps

- (i) After the first Off-Ramp, CalPERS, at its option, may terminate this Agreement at any Off-Ramp as identified in Rider A.
- (ii) In order to effect a termination at an Off-Ramp, CalPERS shall give Contractor written notice.
- (iii) Promptly after giving the aforesaid notice and receipt of Contractor's invoices, CalPERS shall pay Contractor for all accepted deliverables and reasonable costs of demobilization (wind down) and Contract closeout.
- (iv) As promptly as possible, CalPERS shall release and pay any amounts due in the holdback fund established as specified in Rider A.

- C. The payment for accepted deliverables and reasonable costs of demobilization (wind down) and Contract closeout in accordance with this Agreement under this Section is in lieu of all other fees, payments, profits, costs, damages, or claims for reimbursement of any sort that Contractor may present, or to which it may assert entitlement, relating to or arising out of any termination at an Off-Ramp.

8. Termination at Option of CalPERS

This Agreement may be terminated in whole or in part by CalPERS at its option at any time upon thirty (30) days written notice to Contractor.

In the event CalPERS terminates all or a portion of this Agreement at CalPERS option, CalPERS shall within a reasonable time thereafter pay Contractor for satisfactory services performed in accordance with this Agreement prior to the termination at the rates specified in the Agreement. CalPERS obligation to pay Contractor for services performed in such a case shall reflect Contractor's direct costs, overhead, and profit on the services satisfactorily performed in accordance with this Agreement prior to the termination and reasonable costs of demobilization (wind down) and Contract closeout to the extent not already included in Contractor's direct costs, overhead, and profit.

9. Ancillary Issues Relating to Termination at CalPERS Option

- A. In case CalPERS notifies Contractor of a termination of the Agreement at CalPERS option in whole or in part, Contractor shall use its best efforts to discontinue all services affected by the notice as soon as reasonably possible, and shall in all events discontinue all services affected by the notice no later than ten (10) days after receiving the notice, unless the notice specifies that Contractor shall stop work sooner. In addition, Contractor shall:
- (i) Place no further subcontracts for materials, services, or facilities except as necessary to complete the continuing portion of the Agreement (if any);
  - (ii) Terminate all subcontracts to the extent they relate to the work terminated; and,
  - (iii) Settle all outstanding liabilities and resolve all termination settlement proposals arising from the termination of subcontracts.



- B. In case CalPERS terminates this Agreement in whole, and promptly after CalPERS pays Contractor all amounts due under this Agreement, CalPERS and Contractor shall execute mutual general releases and covenants not to sue; provided, however, that the CalPERS release and covenant may exclude claims for return or destruction of any CalPERS documents that Contractor had not returned or destroyed at the time the CalPERS release and covenant was executed.
- C. CalPERS shall not characterize any termination of the Agreement at CalPERS option as a termination for cause or default by Contractor.

10. Remedies in Case of Contractor Default

- A. CalPERS shall have all rights afforded by law in case of Contractor default, including but not limited to: (i) termination of this Agreement; (ii) reformation of this Agreement to lower the price, so as to reflect the value of services actually rendered, in case CalPERS elects to accept services that do not fully meet the requirements of this Agreement; (iii) recovery of CalPERS damages caused by Contractor delay or non-performance; (iv) any liquidated damages specified in this Agreement regardless of whether CalPERS terminates the Agreement for default; and (v) specific performance of particular covenants made by Contractor hereunder. All remedies of CalPERS under this Agreement for Contractor default are cumulative to the extent permitted by law.
- B. In the event CalPERS terminates all or a portion of this Agreement for default by Contractor, CalPERS shall pay Contractor the lesser of (i) the actual value to CalPERS of services satisfactorily performed in accordance with the Agreement prior to the effective date of the termination; and (ii) Contractor's documented direct costs for supplies and labor associated with the performance, plus a reasonable allocation of overhead, but not including any profit.
- C. In the event of a termination for Contractor's default, CalPERS reserves the right to take over and complete the work by contract or other means. In such case, one element of CalPERS recoverable damages shall be any additional cost above the Agreement price incurred by CalPERS to complete the work.
- D. In case CalPERS incurs damages arising out of Contractor default, CalPERS may recover the damages by setting them off against amounts it owes Contractor under this Agreement. CalPERS may exercise its right of off set whether or not CalPERS elects to terminate this Agreement for Contractor default. In case CalPERS elects to terminate this Agreement for Contractor default and CalPERS owes a payment to Contractor under Subsection B of this Section, CalPERS may off set its damages against the payment owing to Contractor.

11. Ancillary Issues Relating to Contractor Default

- A. If CalPERS determines, based on reliable information, that there is a substantial probability that (1) Contractor will be financially unable to continue performance



under this Agreement, or (2) Contractor will be in material breach of this Agreement in the next thirty (30) days, then CalPERS shall have the option to demand that Contractor provide CalPERS with a reasonable assurance of performance. Upon Contractor's receipt of such a demand from CalPERS, Contractor shall provide to CalPERS a reasonable assurance of performance responsive to CalPERS demand. If Contractor fails to provide such an assurance within ten (10) days of CalPERS demand, the failure shall constitute a breach by Contractor justifying termination of the Agreement by CalPERS.

- B. In case CalPERS elects to terminate this Agreement in whole or in part for Contractor's default, CalPERS shall give Contractor ten (10) days written notice of termination for default, specifying the default or defaults justifying the termination. The termination shall become effective after the expiration of such ten (10) day period if the defaults specified by CalPERS in its notice remain uncured at that time.
- C. In case Contractor is working on CalPERS premises or has access to CalPERS computer systems at the time CalPERS issues a notice of termination for default, CalPERS reserves the right to bar Contractor from further access to CalPERS premises or computer systems immediately upon issuance of the notice. If Contractor is so barred but nevertheless reasonably believes that it can cure the default alleged by CalPERS within ten (10) days if CalPERS provides documentation and assistance to Contractor, then CalPERS shall offer Contractor such reasonable cooperation, so as to afford Contractor a reasonable opportunity to cure the defaults alleged by CalPERS before the termination becomes effective. In addition, the ten (10) day period allowed for Contractor to attempt to cure the defaults alleged by CalPERS shall be reasonably extended to take into account the impact of Contractor's not having access to CalPERS premises and computer systems.
- D. CalPERS shall be entitled to retain any amounts that CalPERS has properly withheld from invoices rendered by Contractor until final resolution of all claims by the parties against each other arising out of any Contractor default alleged by CalPERS.

## 12. Contractor Insolvency

Contractor shall notify CalPERS immediately in writing in the event that Contractor files any federal bankruptcy action or state receivership action, any federal bankruptcy or state receivership action is commenced against Contractor, Contractor is adjudged bankrupt, or a receiver is appointed and qualifies. In case event of any of the foregoing events occurs, CalPERS may terminate this Agreement upon five (5) days written notice. If CalPERS does so, CalPERS shall have the right to recover damages from Contractor as though the Agreement had been terminated for Contractor default, and CalPERS shall have the duty to pay Contractor for satisfactory services rendered on the same basis that would apply under this Agreement in case of a termination by CalPERS for Contractor's default.





13. Legal Challenges to the Basis of Termination by CalPERS

If any termination of this Agreement by CalPERS for Contractor's default is judicially determined to have been at CalPERS option and not for Contractor's default, then CalPERS shall have no right to recover from Contractor any damages arising out of the termination, and CalPERS shall pay Contractor for satisfactory services rendered on the basis called for under this Agreement in case of a termination of the Agreement at CalPERS option.

14. Effect of Termination

All duties and obligations of CalPERS and Contractor shall cease upon termination of this Agreement, except that:

- A. Each party shall remain liable for any rights, obligations, or liabilities arising from activities carried on by it under this Agreement prior to the effective date of termination.
- B. Contractor shall return or destroy at CalPERS option: (1) all records of CalPERS; and (2) all materials in Contractor's possession (whether created by Contractor or any other person) containing any sensitive, confidential, or proprietary CalPERS information.
- C. Contractor shall cooperate fully to affect an orderly transfer of services to CalPERS or another contractor if requested by CalPERS.

15. Protection of CalPERS Information

All financial, statistical, personal, technical, and other data, and information relating to CalPERS operations or its members which become available to Contractor shall be protected by Contractor from unauthorized use and disclosure, and shall be dealt with in accordance with the security and confidentiality protocols established by CalPERS Information Security Office.

16. No Assignment or Delegation by Contractor

Contractor may not assign any rights under this Agreement to any person or delegate any duties under this Agreement to any subcontractor or other person without the prior written consent of CalPERS, not to be unreasonably withheld.

17. Liquidated Damages

- A. The Major Milestone Dates set forth in Rider I will be established to reflect the timing and requirements of CalPERS programs for which the deliverables under this Agreement satisfy an urgent business need. Furthermore, CalPERS will plan and allocate its own resources needed to support Contractor in Contractor's efforts hereunder to coordinate with the aforesaid Major Milestone Dates. Accordingly, if any of the deliverables corresponding to Major Milestones are late, this may interfere with CalPERS programs, and will in all cases interfere with CalPERS planning and allocation of its own resources, causing CalPERS loss





and damage. The parties concur that although CalPERS will incur damage in case deliverables are late, it may prove impractical and extremely difficult to fix the actual damages that CalPERS suffers in such an instance. The parties further concur that in lieu of CalPERS actual, proven damages for lateness, CalPERS shall recover from Contractor the liquidated damages specified in Rider A for any Major Milestone that is late. These amounts are payable as liquidated damages and not as a penalty. They are in lieu of all other damages that CalPERS may seek to recover for Contractor's lateness in meeting a Major Milestone Date, all of which damages CalPERS hereby waives.

- B. Contractor shall be liable for liquidated damages in the amount per day specified on Rider A for each day that Contractor is late in meeting the Major Milestone Date associated with the particular stated amount per day. If on a Major Milestone due date, Contractor does not give CalPERS a deliverable that Contractor in good faith believes meets the requirements of the deliverable due on that date, the Major Milestone will be considered late on that date, and liquidated damages will begin to accrue as of that date. If on a Major Milestone due date Contractor provides CalPERS with a deliverable that Contractor in good faith believes meets the requirements of the deliverable due on that date then the Major Milestone will be not be considered late until CalPERS has issued a Notice of Rejected Deliverable at which time liquidated damages will begin to accrue.
- C. The obligation of Contractor to pay liquidated damages shall be subject to off set against any undisputed amount that is due and owing by CalPERS to Contractor. Any liquidated damages due and owing from Contractor that are not subject to such set-off shall be invoiced by CalPERS and shall be paid by Contractor within thirty (30) days.

18. Deficiency Cure Process

The Deficiency Cure Process establishes a formal process which allows Contractor to correct a deficiency identified by CalPERS, including any deficiency contained in a rejected deliverable, within a specified time frame. The Deficiency Cure Process is initiated by either a Notice of Deficiency or Notice of Rejected Deliverable.

A. Notice of Deficiency

- (i) If Contractor fails to comply with any provision of this Agreement, CalPERS may issue a Notice of Deficiency. The Notice shall be in writing and state the specific reason for the deficiency.
- (ii) Within ten (10) days of receipt of the Notice, Contractor will correct the deficiency and provide a written response to CalPERS certifying that the deficiency has been corrected or at the sole discretion of the CalPERS, may provide a documented corrective action plan subject to acceptance by CalPERS.
- (iii) If Contractor fails to correct the deficiency or provide an acceptable corrective action plan by the close of business on the tenth (10<sup>th</sup>) day after



receipt of the Notice, CalPERS Project Manager shall initiate the PSR Escalation Process.

B. Notice of Rejected Deliverable

- (i) If Contractor submits a deliverable that is deemed to be unsatisfactory, CalPERS shall issue a Notice of Rejected Deliverable. The Notice shall be in writing and state the specific reason for the deficiency and provide the timelines for correction of the deficiency. Rider I provides the detailed process for correction of rejected deliverables.
- (ii) If Contractor fails to correct the deliverable deficiency following the process specified in Rider I CalPERS may initiate the PSR Escalation Process.
- (iii) A rejected Deliverable subject to the Deficiency Cure Process is not considered accepted by CalPERS until a Notice of Accepted Deliverable is issued.

19. PSR Escalation Process

- A. In the event that issues or disagreements involving contract related concerns can not be resolved within a timely manner the PSR Escalation Process will be initiated. This process assumes that every effort possible will be made to resolve items at the lowest possible level by the Contractor employees and CalPERS employees who have responsibility for the administration of this Agreement. The Contractor shall continue to attempt to correct the Notice of Deficiency or Notice of Rejected Deliverable during the PSR Escalation Process.
- B. Issues or disagreements that are identified for escalation by either CalPERS or the Contractor shall be documented in a format prescribed by CalPERS and provided to the Contractor Project Manager and the CalPERS Project Manager.
- C. The CalPERS Project Manager and Contractor Project Manager will, within three (3) State business days, meet and attempt to resolve the issue or disagreement. If the issue or disagreement is resolved at this level the resolution will be documented and signed by both parties. If the issue or disagreement is unresolved or substantial progress has not been made after five (5) State business days the issue or disagreement will be presented to the PSR Steering Committee.
- D. The PSR Steering Committee, the CalPERS Project Manager, Contractor Project Manager, and appropriate Contractor Senior Management will meet and attempt to resolve the issue or disagreement. If the issue is resolved at the PSR Steering Committee level the resolution will be documented and signed by both parties. If the issue or disagreement is unresolved after ten (10) State business days the Dispute Resolution Process will be initiated.



20. Dispute Resolution Process

- A. Except as set forth in Subsection B of this Section, if any dispute arising out of or in connection with this Agreement is not resolved after completing the PSR Escalation Process, the parties shall attempt to resolve the dispute through executive level involvement. The Executive Officer of each party or his or her designated representative shall meet and confer to attempt to resolve the dispute. If the parties agree, a neutral third party mediator may be engaged to assist in dispute resolution at either the line employee level or the executive level, or both. If after expending reasonable efforts at executive level resolution of the dispute, no resolution can be reached, then either party may seek its rights and remedies in a court of competent jurisdiction.
- B. CalPERS shall not be required to follow the dispute resolution process set forth in this Section before issuing any notice of termination for default under this Agreement and barring Contractor from further access to CalPERS computer systems and premises. However, neither party may seek its rights and remedies in court respecting any such notice of termination for default without first following the dispute resolution process stated in this Section.
- C. The Contractor shall continue to attempt to correct the Notice of Deficiency or Notice of Rejected Deliverable during the Dispute Resolution Process.

21. Attorneys' Fees and Costs

In the event of any litigation between the parties to enforce or interpret the provisions of this Agreement, the non-prevailing party shall, unless both parties agree to the contrary, pay the attorneys' fees and costs of the prevailing party arising from such litigation, including reasonable attorneys' fees, allocated costs for services of in-house counsel, and court costs. These attorneys' fees and costs shall be in addition to any other relief to which the prevailing party may be entitled.

22. Intellectual Property in Deliverables; Intellectual Property Indemnity

- A. In case this Agreement calls for deliverables that incorporate intellectual property, Contractor represents and warrants that it either owns or has the right and authority to grant to CalPERS the rights in such deliverables stated in this Agreement for use in the U.S., without infringing the proprietary rights of others.
- B. Contractor agrees to indemnify and hold CalPERS harmless from any loss, damage or injury; to defend at its own expense any and all suits and actions; and to pay any judgments against CalPERS arising out of any alleged infringement of patent rights or copyrights enforceable in the U.S. or alleged misuse of trade secret information by such deliverables under U.S. law. Contractor's indemnification obligations under this Section are subject to Contractor receiving prompt notice of the claim and being given the right to control the defense of such claim.



- C. Contractor will have no liability to CalPERS pursuant to this Section to the extent that: (i) the claim of infringement is based upon the use of software, services, or Deliverables provided by Contractor and paid for by CalPERS under this agreement, in connection with or in combination with equipment, devices, or software not supplied by Contractor, if the infringement would not have occurred but for that combination; (ii) the claim of infringement is based upon the use of software, provided by Contractor under this agreement, in a manner for which the software was not designed, if the infringement would not have occurred but for that use; (iii) the claim of infringement is based upon CalPERS modification to any Deliverable or service provided by Contractor under this agreement, if such infringement would not have occurred but for such modification; or (iv) the claim of infringement arises out of Contractor's compliance with specifications, requirements, or directions provided by CalPERS, and such infringement would not have occurred but for such compliance.

## FINANCIAL PROVISIONS

### 23. Scope of Consideration Paid

The consideration specified herein to be paid Contractor is in full compensation for all of Contractor's costs incurred in the performance hereof, excluding per diem, unless otherwise expressly so provided.

### 24. Invoices and Payments

- A. This is a deliverable-based Agreement. Unless payment on a different basis is specified under this Agreement, Contractor will invoice CalPERS as specified in Rider A.
- B. All invoices for payment shall be submitted in arrears for work already performed. No invoice may be rendered, and no payments will be made, for services not yet rendered, in whole or in part.
- C. CalPERS shall make payment to Contractor for performance under this Agreement as promptly as fiscal procedures permit, and in accordance with invoices submitted, except CalPERS shall withhold an amount equal to ten percent (10%) of each invoice pending final completion of this Agreement. If Contractor is a nonprofit organization and the value of this Agreement is less than \$500,000, or if Contractor is a small business, payment is due 30 days from the date the services are received and accepted by CalPERS or 30 days from the date a correct invoice is received in the office specified by CalPERS, whichever is later. Except in the instances stated above, payment is due to Contractor 45 days from the date the services are received and accepted by CalPERS or 45 days from the date a correct invoice is received in the office specified by CalPERS, whichever is later. When provision is made for a testing period preceding acceptance by CalPERS, "date of acceptance" shall mean the date services are accepted by CalPERS during the specified testing period.



25. Taxes

CalPERS is exempt from federal excise taxes and shall not be required to make any payment for any personal property taxes levied on Contractor or any taxes levied on employee wages. The only taxes CalPERS will pay on the services rendered pursuant to this Agreement are state and local sales or use taxes.

26. Funding Provisions

The validity of this Agreement is subject to the availability of funds approved by the CalPERS Board, in accordance with Article XVI, section 17, California Constitution. If this Agreement overlaps CalPERS fiscal years, CalPERS monetary obligation under this Agreement in subsequent fiscal years is subject to and contingent upon availability of funds budgeted for the purpose of this Agreement.

## **COMPLIANCE ISSUES**

27. Permits and Licenses

Contractor shall carry out its duties and responsibilities herein in accordance with, be limited in the exercise of its rights by, and observe and comply with, all federal, state, city and county laws, rules or regulations affecting services under this Agreement. Contractor shall procure and keep in full force and effect during the term of this Agreement all permits and licenses necessary to accomplish the work contemplated in this Agreement. If Contractor is either a foreign or domestic corporation it must be in good standing and must be qualified to do business in California currently and during the term of the contract.

28. Reports and/or Meetings

- A. Contractor will submit to CalPERS Project Manager or designee a formal written Monthly Project Status Report which tracks the progress achieved against the planned schedule, milestones, deliverables, and cost schedules.
- B. Contractor shall provide additional oral or written progress reports as requested by CalPERS to determine if Contractor is performing to expectations and is on schedule, to provide communication of interim findings, and to afford occasions for discussing and resolving problems encountered.
- C. Contractor will attend a weekly or biweekly Status Meeting and provide, at CalPERS Project Manager or designee request, either a brief oral Weekly Summary Status or other type of additional reporting, including but not limited to, status or resource allocation reports outlining progress or problems.
- D. Contractor shall also meet with CalPERS staff and/or the CalPERS Board upon request to discuss progress on the Agreement or to present findings, conclusions, and recommendations.



- E. Additional details on reporting and meeting requirements are contained in Rider I.

29. Books and Records

- A. Contractor shall maintain adequate books, accounts, and records to establish its compliance with all Contractor covenants, representations, and warranties made in this Agreement, and shall require all permitted subcontractors to do the same. Contractor's financial statements shall be prepared in accordance with Generally Accepted Accounting Principles. Contractor's financial statements, books, accounts, and records shall be prepared and maintained in compliance with all applicable state and federal laws, regulations, and statutory accounting principles.
- B. All books and records required by this Section to be kept shall be kept in a secure location at [REDACTED] and shall be available for inspection and copying by CalPERS and its representatives at any time.

30. Examination and Audit

- A. Contractor shall be subject to examination and audit by the Bureau of State Audits, CalPERS, and CalPERS authorized representatives ("the Representatives") during the term of this Agreement and for three (3) years after CalPERS final payment to Contractor under this Agreement. Any examination or audit shall be limited to the performance of services under this Agreement, including, without limitation, the costs of administering this Agreement. Contractor shall cooperate fully with the Bureau of State Audits, CalPERS, and the Representatives in connection with any examination or audit. On thirty (30) days prior notice for audits or examinations of a routine nature (and on reasonable shorter notice for nonroutine audits or examinations), Contractor shall permit the Bureau of State Audits, CalPERS, and the Representatives, during normal business hours, to inspect, audit, and copy all financial statements, books, accounts, and records of Contractor relating to this Agreement, including Contractor's performance against performance standards and the terms of this Agreement, and anything else that CalPERS reasonably determines should be examined or audited. Contractor will provide copies of any records or documents requested in connection with an audit or examination within thirty (30) days after request.
- B. Contractor will cooperate fully in the development of any corrective action plans that CalPERS determines to be necessary as a result of audit or examination. Contractor will research any discrepancies identified by CalPERS auditors and report the results of this research to CalPERS within fifteen (15) State business days of the identification of the discrepancies. Any necessary adjustments, payments, or reimbursements shall be made promptly by the appropriate party.
- C. Contractor will provide CalPERS with five (5) copies of its annual Statement on Auditing Standards (SAS) 70 Type II report each year. The SAS 70 review and auditor reports will comply with the American Institute of Certified Public Accounts (AICPA's) SAS 70, as amended.





31. Consequences of Breach

If Contractor's failure to satisfy the requirements of the "Books and Records" or the "Examination and Audit" items of this Agreement prevents CalPERS from being able to confirm that Contractor met a particular obligation to CalPERS, Contractor shall have the burden of proof to establish that Contractor did meet the obligation. In case Contractor cannot establish through other means that it met the obligation, then the obligation shall conclusively be deemed unsatisfied.

32. Disabled Veteran Business Participation

- A. Contractor agrees that, as a Contractor of CalPERS, it will meet the requirements of the CalPERS Board's policies which embrace section 10115, et seq. of the Public Contract Code (PCC) regarding the 3% disabled veteran business enterprise (DVBE) participation goal for state contracts. DVBE is referred to hereafter as a "Targeted Business Enterprise" (TBE).
- B. Contractor, in contracting for goods and services pursuant to this Agreement, shall make good faith efforts to comply with the CalPERS Board's objectives and then-current policies regarding TBEs. Contractor shall report such efforts and the level of participation by TBEs to CalPERS in the format prescribed by CalPERS.
- C. Nothing shall be construed to authorize any contractor to discriminate in the solicitation or acceptance of bids for subcontracting, or for materials or equipment, on the basis of race, color, sex, ethnic origin, or ancestry.
- D. Contractor agrees to provide CalPERS or its delegate with any information reasonably necessary to comply with the obligations set forth in the applicable provisions of PCC sections 10115, et seq. Upon reasonable notice, Contractor shall permit CalPERS or its delegate access to its premises during normal business hours to interview employees and to inspect and copy books, records, accounts, and other materials for the purpose of determining compliance with the applicable provisions of PCC sections 10115, et seq. and Title 2, California Code of Regulations, sections 1896.60, et seq. Contractor agrees to maintain such records for a period of three (3) years after final payment under this Agreement. Contractor further agrees to make this Section applicable to all subcontracts entered into hereunder.

33. Nondiscrimination

During the performance of this Agreement, Contractor and its subcontractors, as well as their agents and employees, shall not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)), mental disability, medical condition (including health impairments related to or associated with a diagnosis of cancer for which a person has been rehabilitated or cured), age (40 or over), marital status, or use of family and medical care leave pursuant to federal law. Contractors and





subcontractors, as well as their agents and employees, shall ensure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. Contractor and subcontractors, as well as their agents and employees, shall comply with the provisions of the Fair Employment and Housing Act (Government Code, section 12900, et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, section 7285.0, et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this Agreement by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under this Agreement.

34. Statement of Compliance - Nondiscrimination

Contractor's signature affixed hereon and dated shall constitute a certification under the penalty of perjury under the laws of the State of California that Contractor has, unless exempted, complied with the nondiscrimination program requirements of Government Code section 12990 and Title 2, California Code of Regulations, section 8103, et seq.

35. Americans with Disabilities Act

By signing this Agreement, Contractor assures CalPERS that it complies with the Americans with Disabilities Act (ADA) of 1990, (42 U.S.C. 12101, et seq.), which prohibits discrimination on the basis of disability, as well as all applicable regulations and guidelines issued pursuant to the ADA.

36. National Labor Relations Board Certification

Contractor, by signature hereto, does swear under penalty of perjury that no more than one final unappealable finding of contempt of court by a Federal court has been issued against Contractor within the immediately preceding two-year period because of Contractor's failure to comply with an order of a Federal court which orders Contractor to comply with an order of the National Labor Relations Board.

37. Drug-Free Workplace

Contractor hereby certifies under penalty of perjury under the laws of the State of California that Contractor will comply with the requirements of the Drug-Free Workplace Act of 1990 (Government Code section 8350, et seq.) and will provide a drug-free workplace by taking the following actions:

- A. Publish a statement notifying employees that unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited and specifying actions to be taken against employees for violations.



- B. Establish a Drug-Free Awareness Program to inform employees about:
  - (i) The dangers of drug abuse in the workplace;
  - (ii) The person's or organization's policy of maintaining a drug-free workplace;
  - (iii) Any available counseling, rehabilitation and employee assistance programs; and,
  - (iv) Penalties that may be imposed upon employees for drug abuse violations.
- C. Every employee who works on the proposed Agreement will:
  - (i) Receive a copy of the company's drug-free policy statement; and,
  - (ii) Agree to abide by the terms of the company's statements as a condition of employment on the Agreement.

## **CONTRACTOR INTEGRITY AND PROCESS INTEGRITY ISSUES**

### **38. No Benefit from Recommendations**

Contractor shall not directly or indirectly receive any benefit from recommendations made to CalPERS and shall disclose to CalPERS any personal investment or economic interest of Contractor which may be enhanced by the recommendations made to CalPERS.

Neither the Contractor which is awarded a contract under this RFP No. 2004-3494, nor any of its subsidiaries, officers or directors, may submit a bid or be awarded a contract for the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed to be an outgrowth of any advice or recommendations that the awardee provides under a contract resulting from such RFP.

### **39. Fair Political Practices**

Contractor acknowledges that CalPERS is subject to the provisions of the Fair Political Practices laws of California (Government Code section 81000, et seq., and all regulations adopted thereunder, including, but not limited to Title 2, California Code of Regulations section 18700) and Contractor shall comply promptly with any applicable requirement thereunder.

### **40. Statements of Economic Interest**

If required by law, Contractor shall require its personnel named in response to Section V, in the Request for Proposal and all later substitutions therefore to file Statements of Economic Interests in compliance with CalPERS Conflict of Interest Code (California Code of Regulations, Title 5, Part III, Chapter 1, section 560, et seq.). All such reports shall be filed simultaneously with CalPERS.



41. Prohibited Relationships

- A. Each of the following persons is defined as an "Impacted Individual" for purposes of this Section:
- (i) any Contractor employee;
  - (ii) any Contractor officer;
  - (iii) any Contractor director;
  - (iv) any shareholder who owns more than 3% of the equity interest of Contractor; or,
  - (v) the spouse, domestic partner or dependent of any of the foregoing persons.
- B. Contractor represents and warrants that as of the Effective Date, to the best of its knowledge and after conducting a reasonable inquiry, there is no Impacted Individual who is personally employed in any capacity by CalPERS (as a full-time employee, independent contractor, or otherwise) and who, acting in his or her official capacity:
- (i) has participated in;
  - (ii) is participating in; or,
  - (iii) is reasonably anticipated to participate in
- the performance of this Agreement, the process of forming it, or the making of any decisions regarding it.
- C. In making the foregoing representation and warranty Contractor is mindful of the provisions of Section B.6 of the Invitation to Partner (ITP) No. 2004-3494, which provides, among other things, that individuals with certain defined statuses within CalPERS are deemed to be "participating" for purposes of compliance with those provisions, and that CalPERS has the final and sole discretion to determine whether an individual is "participating". The aforesaid definition of "participating" from the ITP is incorporated by reference and also used in this Section.
- D. Contractor represents and warrants that as of the Effective Date, to the best of its knowledge and after conducting a reasonable inquiry, Contractor is not aware of any facts or circumstances that would make this Agreement void or voidable under the provisions of law listed in Section B.6(d) of the ITP.
- E. Contractor represents and warrants that as of the Effective Date of this Agreement, to the best of its knowledge and after conducting a reasonable inquiry, there is no person engaged on behalf of Contractor in any capacity (whether as a full-time employee, independent contractor, or otherwise) who participated in the formation of the Agreement or the making of any decisions regarding it on behalf of CalPERS and who became engaged by Contractor within the two year period before such person left the employ of CalPERS.



- F. Contractor represents and warrants that as of the Effective Date of this Agreement, to the best of its knowledge and after conducting a reasonable inquiry, there is no person engaged on behalf of Contractor in any capacity (whether as a full-time employee, independent contractor, or otherwise) who was engaged in a policymaking position by CalPERS in the same general subject matter area covered by this Agreement and who became engaged by Contractor within the one year period before such person left the employ of CalPERS.
- G. If on any date during the term of this Agreement Contractor becomes aware of facts or circumstances, whether they existed on the Effective Date and Contractor failed to discover them at that time despite reasonable inquiry, or whether they arose after the Effective Date, that would make any of Contractor's representations and warranties contained in this Section no longer correct as of such later date, Contractor shall immediately notify CalPERS of such facts or circumstances. CalPERS reserves the right to take appropriate action based on these newly revealed facts or circumstances, including voiding this Agreement, consistent with State law.

## GENERAL PROVISIONS

42. Time is of the Essence

Time is of the essence in this Agreement. However, Contractor shall not be in breach of this Section until the parties have attempted to resolve disagreement over any deficiency alleged by CalPERS, by completing the PSR Escalation Process. Further, a non-material breach of this Section cannot form the basis of any notice of termination for default.

43. Evaluation of Contractor

Pursuant to PCC Code section 10369, CalPERS shall evaluate Contractor's performance under the terms and conditions of this Agreement within sixty (60) days after the completion of Contractor's performance under this Agreement. If the evaluation indicates unsatisfactory performance, a copy will be sent to the Department of General Services, the Office of Legal Services, and to Contractor who may file a response to the evaluation. The evaluation and response shall remain on file for thirty-six (36) months and shall not be public records.

44. Notice of Proceedings

Contractor shall promptly notify CalPERS in writing of any investigation, examination, or other proceeding involving Contractor, or any Key Person, commenced by any regulatory agency that a reasonable person might believe could adversely affect Contractor's ability to perform this Agreement.

45. Binding Effect

This Agreement, any instrument or agreement executed pursuant to this Agreement, and the rights, covenants, conditions, and obligations of Contractor and CalPERS contained therein, shall be binding upon the parties and their successors, assigns, and legal representatives.

46. Titles/Section Headings

Titles or headings are not part of this Agreement, are for convenience of reference only, and shall have no effect on the construction or legal effect of this Agreement.

47. Publicity

No publicity release or announcement concerning this Agreement or the transactions contemplated herein shall be issued by Contractor without advance written approval by CalPERS.

48. No Conflicts or Consents

Contractor represents and warrants that neither the execution of this Agreement by Contractor, nor the acts contemplated hereby, nor compliance by Contractor with any provisions hereof will: (i) violate any provision of the charter documents of Contractor; (ii) violate any statute or law or ordinance or any judgment, decree, order, regulation or rule of any court or governmental authority applicable to Contractor; or (iii) violate, or be in conflict with, or constitute a default under, or permit the termination of, or require the consent of any person under, any agreement to which Contractor may be bound, the violation of which in the aggregate would have a material adverse effect on the properties, business, prospects, earnings, assets, liabilities, or condition (financial or otherwise) of Contractor.

49. Due Organization

Contractor represents and warrants that it is duly organized, validly existing, and in good standing under the laws of the State of its incorporation or organization.

50. Power and Authority

Contractor represents and warrants that: (i) it has the power and authority to enter into this Agreement and to carry out its obligations hereunder; (ii) the execution of this Agreement has been duly authorized by Contractor and no other proceeding on the part of Contractor is necessary to authorize this Agreement; and (iii) Contractor has completed, obtained, and performed all registrations, filings, approvals, authorizations, consents, or examinations required by any government or governmental authority for its acts contemplated by this Agreement.

51. Severability

Should one or more provisions of this Agreement be held by any court to be invalid, void, or unenforceable, such provision(s) will be deemed to be restated to effect the original intentions of the parties as nearly as possible in accordance with applicable law. The remaining provisions shall nevertheless remain and continue in full force and effect.

52. Force Majeure

Neither party to this Agreement shall be in default of its obligations hereunder for delay or failure in performing that arises out of causes beyond the control and without the fault or negligence of the offending party. Such causes may include, but are not restricted to, Acts of God or of the public enemy, acts of the State in its sovereign capacity, fires, floods, power failure, disabling strikes, epidemics, quarantine restrictions, and freight embargoes.

53. Signature Authorization

The person signing this Agreement on behalf of Contractor warrants that he/she is an agent of Contractor and is duly authorized to enter into this Agreement on behalf of Contractor.

54. Additional Documents

Contractor and CalPERS agree to execute such additional documents, and perform such further acts, as may be reasonable and necessary to carry out the provisions of this Agreement.

55. Entire Agreement/Incorporated Documents/Order of Precedence

- A. This Agreement contains all representations and the entire understanding between the parties hereto with respect to the subject matter hereof. Any prior correspondence, memoranda, or agreements are replaced in total by this Agreement.
- B. This Agreement shall consist of:
  - (i) The terms of this Agreement;
  - (ii) All attached documents, which are expressly incorporated herein;
  - (iii) Request for Proposal No. 2004-3494, dated July 22, 2005, including any amendments or clarification issued by CalPERS (collectively "the RFP"), all of which are expressly incorporated herein; and,
  - (iv) Contractor's response to the RFP, dated \_\_\_\_\_, which is expressly incorporated herein.
- C. In the event there are any inconsistencies or ambiguities among the terms of this Agreement and incorporated documents, the following order of precedence shall be used: (i) applicable laws; (ii) the terms and conditions of this Agreement,



including attachments; (iii) the RFP; (iv) Contractor's response to the RFP; and (v) any other provisions, terms, or materials expressly incorporated herein.

56. Waivers

No delay on the part of either party in exercising any right, power, or privilege hereunder shall operate as a waiver thereof. No waiver on the part of either party of any right, power, or privilege hereunder, nor any single or partial exercise of any right, power, or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power, or privilege hereunder.

57. Incorporation of Amendments to Applicable Laws

Any references to sections of federal or state statutes or regulations shall be deemed to include a reference to any amendments thereof and any successor provisions thereto.

58. Choice of Law, Jurisdiction, and Venue

This Agreement shall be administered, construed, and enforced according to the laws of the State of California (without regard to any conflict of laws provisions) to the extent such laws have not been preempted by applicable federal law. Any suit brought hereunder shall be brought in the state or federal courts sitting in Sacramento, California, the parties hereby waiving any claim or defense that such forum is not convenient or proper. Each party agrees that any such court shall have in personam jurisdiction over it and consents to service of process in any manner authorized by California law.

59. Independent Contractor

Contractor and Contractor's personnel shall operate as independent contractors and shall not be considered as employees or agents of CalPERS or the State of California.

60. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

61. Notices

Any notice or other written communication that may or must be given hereunder shall be deemed given when delivered personally, or if it is mailed, three (3) days after the date of mailing, unless delivery is by express mail, telecopy, or telegraph, and then upon the date of the confirmed receipt, to the following representatives:

For CalPERS: California Public Employees' Retirement System  
Lincoln Plaza West  
Attention: Contracts Administrator  
400 Q Street, Room W2580  
Sacramento, CA 95814





Telephone No. (916) 795-3020

FAX No. (916) 795-3379

For Contractor:      Name:  
                                 Firm:  
                                 Address:  
                                 City, State, Zip Code:  
                                 Telephone No.  
                                 FAX No.

Either party hereto may, from time to time by notice in writing served upon the other as aforesaid, designate a different mailing address or a different or additional person to which all such notices or other communications thereafter are to be addressed.

62.    Days

Wherever in this Agreement a set number of days is stated or allowed for a particular event to occur, the days are understood to include all calendar days, including weekends and holidays, unless otherwise specified.

**INFORMATION TECHNOLOGY PROVISIONS**

63.    Intellectual Property Rights in Deliverables Other than Software

- A.    The rights and duties of the parties with respect to Software Products are set forth in Rider G.
- B.    Unless otherwise agreed in a Rider, Contractor hereby grants to CalPERS an unlimited, irrevocable, perpetual, royalty-free, non-exclusive, worldwide license, for any CalPERS program purpose, to use, modify, reproduce, perform, release, display, create derivative works from and disclose all inventions, discoveries, works of authorship, technical communications and records prepared by Contractor under this Agreement other than Software Products, including but not limited to papers, reports, charts, and administrative communications and records.
- C.    The ideas, concepts, know-how, or techniques relating to data processing, developed during the course of this Agreement by Contractor or jointly by Contractor and CalPERS may be used by either party without obligation of notice or accounting.
- D.    This Agreement shall not preclude Contractor from developing materials outside this Agreement that are competitive with the materials developed for CalPERS, irrespective of their similarity to materials developed for CalPERS under this Agreement.



64. Disablers and Viruses

- A. Contractor warrants that any software deliverable, when installed, will not contain any feature, program, data, or device that is designed to cause the software to stop functioning, function improperly, or slow down because of (i) the passage of time; or (ii) an attempt by CalPERS to remove the software from a particular central processing unit or computer environment and install it on a different central processing unit or in a different computer environment; or (iii) an instruction from Contractor during a payment dispute or otherwise; or (iv) the occurrence of any other event.
- B. Contractor warrants that it will take no action to intentionally disrupt or terminate the functioning of any software deliverable without CalPERS prior written consent or a court order. This warranty is given without regard to whether a breach of this Agreement by CalPERS is alleged to have occurred, and without regard to whether CalPERS has paid money allegedly due to Contractor.
- C. Because breach by Contractor of the warranties contained in this Section could result in extensive damage to CalPERS operations, Contractor agrees that notwithstanding any other provision of this Agreement to the contrary, CalPERS may pursue all available remedies for breach of these warranties, including actions for direct, incidental, consequential and exemplary damage, plus attorneys' fees and costs.

65. Year 2000 (4-Digit Year Compliant)

Contractor warrants that its hardware, software, and firmware products delivered under this Agreement shall be able to accurately process date data (including, but not limited to, calculating, comparing, and/or sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000. This warranty must include leap year calculations to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date data with it. This warranty is subject to the warranty terms and conditions of this Agreement. Nothing in this warranty shall be construed to limit any rights or remedies CalPERS may otherwise have under this Agreement with respect to defects other than Year 2000 (4-digit year) performance.